

USDC SCAN INDEX SHEET



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CRMEMSUP.

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15 IN THE UNITED STATES DISTRICT COURT
 16 SOUTHERN DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,)	CR Case No. 98-0519-JM
18 Plaintiff,)	Sentencing: 12/18/98
19 v.)	8:30 a.m.
20 RUSSELL J. CONTE,)	DEFENDANT CONTE'S
21 Defendant.)	PRESENTENCE
)	MEMORANDUM

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5 I. OVERVIEW

6 CONTE, age 41, married with three children, has plead guilty
7 to one count of wire fraud for his involvement in a fraudulent
8 scheme in which his former friend, MURDOCK, lost \$2.7 million.
9 CONTE believes he is in Criminal History Category II, and, without
10 downward departure but with -3 for acceptance of responsibility and
11 without +2 for abuse of position of trust, has a total offense
12 level of 18, which results in a Guideline range of 30-37 months.
13 CONTE asks for departure of at least 10 levels for a Guideline
14 range of 4-10 months¹, Zone B, and halfway house/work release. By
15 separate motion CONTE requests downward departure on various
16 grounds, the most important of which are post-conduct/pre-criminal
17 investigation rehabilitation and restitution and diminished
18 capacity/bi-polar condition.

19 II. SUMMARY OF WRITTEN PLEA AGREEMENT

20 By the written plea agreement, CONTE has plead to one count of
21 wire fraud, 18 U.S.C. §1343. Under the detailed factual basis

22

23 ¹ If the court agrees with CONTE and finds no
24 additional 2 points for abuse of position of trust, CONTE'S
25 offense level is 18: $6 + 13 + 2 - 3 = 18$. An offense level
26 of 18 and Criminal History Category of II yields 30-37
27 months, Zone D. A downward departure of 10, an offense
level of 8 and a Criminal History Category of II yields 4-10
months, Zone B. If the Government prevails on the position
of trust issue and the court finds Criminal History Category
II and departs downward 10 levels, this yields 8-14 months,
Zone C.

1 contained at pages 3-9, the fraudulent scheme is explained. In
2 short, CONTE, then living in Utah, recommended that his friend,
3 MURDOCK in Utah, invest with BOGART and LUCCI, both of San Diego.
4 Unknown to MURDOCK, CONTE and BOGART agreed that CONTE would
5 receive 10% of all monies MURDOCK invested with BOGART, and CONTE
6 in fact received the 10% monies. It was not until MURDOCK invested
7 over a million dollars with BOGART that CONTE realized that BOGART
8 was scamming MURDOCK. Thus, BOGART was defrauding both MURDOCK and
9 CONTE, and at the same time CONTE defrauded MURDOCK by not
10 informing MURDOCK of the 10% CONTE was receiving. In addition,
11 once CONTE discovered BOGART'S fraud, he agreed to the continuation
12 and entered into an agreement with BOGART under which CONTE was to
13 receive a higher percentage.

14 At page 13 of the plea agreement the parties agree to
15 recommend a base offense level of 6, +13 for loss of more than \$2.5
16 million, +2 for more than minimal planning, and -3 for acceptance
17 of responsibility, resulting in an adjusted offense level of 18.
18 In addition, the Government will recommend +2 points for violation
19 of position of trust "as MURDOCK'S financial advisor and friend"
20 and CONTE has leave to oppose the adjustment, which he has done by
21 his objections to the PSR and this memorandum. There is no
22 agreement as to the Criminal History Category.

23 As to departures, CONTE may argue for downward departure on
24 any ground and he has filed a Motion for Downward Departure. The
25 Government opposes any departure, but agrees not to recommend any
26 upward departure. Id. pg.14. The Government recommends a sentence
27 of 41 months. Id. at pg.14.

1 The parties do not make any recommendation with respect to a
2 fine, but jointly recommend that CONTE pay restitution in the
3 amount of \$2,691,555 to MURDOCK. Id. at pg.16.

4 Finally, CONTE waives his appeal in any collateral attack
5 unless the court imposes a custodial sentence greater than the high
6 end of the Guidelines in accordance with the offense level agreed
7 to and recommended by the parties, which is 18. Id. at pg.16. The
8 Government's position is that the Criminal History Category is III,
9 whereas CONTE argues that it is II. Again, under Category III,
10 offense level 18, the Guideline range is 33-41 months; under
11 Category II, offense level 18, the range is 30-37 months; thus, the
12 high end with respect to an appeal is 41 and 37 months,
13 respectively.

14 **III. CRIMINAL HISTORY CATEGORY**

15 The probation officer calculated a Criminal History Category
16 of III; the Government objected and added 1 point, which also
17 resulted in a III. The Defendant's position is that the Criminal
18 History Category is II. See Charts, EXHIBITS 1 and 2, attached.

19 It is clear that the federal courts give deference to a state
20 court's decision to vacate a criminal judgment and sentence. See,
21 e.g., U.S. v. Guthrie, 931 F.2d 564, 572 (9th Cir. 1991) (where
22 "state court vacates a defendant's prior state conviction, the
23 sentence resulting from that conviction may not influence the
24 defendant's criminal history score under the Guidelines.").
25 Moreover, it is clear that home detention is not imprisonment.
26 See, e.g., U.S. v. Phipps, 68 F.3d 159, 162 (7th Cir. 1995)
27 (imprisonment used in the Guidelines means time in a penal

1 institution; home detention is not imprisonment; it is a
 2 "substitute for imprisonment."). Likewise for work release. See
 3 also, U.S. v. Compton, 82 F.3d 179, 183-184 (7th Cir. 1996)
 4 ("imprisonment" is "time actually spent in a penal institution;"
 5 citing Phipps).

6 Thus, as shown in EXHIBIT 2, CONTE receives 3 criminal history
 7 points: 1 for the Utah federal "sentence of imprisonment" of less
 8 than 60 days, and 2 for commission of the offense while on
 9 probation. Contrary to what the Government claims, CONTE does not
 10 receive 1 point under S4A1.1(e) (offense committed within 2 years
 11 of prior offense) because (e) applies only to (a) (1 year or more)
 12 and (b) (6 months or more) offenses, and CONTE has none; CONTE'S
 13 Utah federal offense is a (c) (less than 60 days) because the
 14 "sentence of imprisonment" was modified to a six-week
 15 (approximately 45 days) sentence.²

16 **IV. ABUSE OF TRUST: SENTENCING ENHANCEMENT UNDER §3B1.3 IS
 17 INAPPROPRIATE IN THIS CASE.**

18 **A. The Plea Agreement**

19 The plea agreement at pg.14 permits the Government to
 20 recommend, and CONTE to oppose, application of a two-level upward
 21 adjustment for "violation of a position of trust," pursuant to
 22 §3B1.3, which calls for an upward adjustment where CONTE "abused a
 23 position of public or private trust, or used a special skill, in a
 24 manner that significantly facilitated the commission of or
 25 concealment of the offense." The Government makes no claim as to

26 ² In CONTE's objections to the PSR, incorporated by
 27 reference, CONTE submitted court records and evidence of the
 Utah federal sentence modification.

1 skill, only as to trust; and as the circuit cases demonstrate,
2 friendship is not enough. CONTE submits that the S3B1.3 is wholly
3 inapplicable to the facts of this case.

4 **B. Application Note**

5 Application Note 1 to S3B1.3 states that "public or private
6 trust refers to a position of public or private trust characterized
7 by professional or managerial discretion (i.e., substantial
8 discretionary judgment that is ordinarily given considerable
9 deference)." Application Note 2 defines special skill as "a skill
10 not possessed by members of the general public and usually
11 requiring substantial education, training, or licensing. Examples
12 would include pilots, lawyers, doctors, accountants, chemists, and
13 demolition experts." It is significant to note that the
14 Application Note was amended, which amendment took effect on
15 November 1, 1993. By the amendment, the Commission places the
16 emphasis on managerial and professional discretion. Thus, this
17 court should be watchful for any pre-November 1, 1993 cases upon
18 which the Government relies. The impact of the amendment is well
19 illustrated in the case of U.S. v. Recco, 151 F.3d 29 (1st Cir.
20 1998) in which the court held that a receptionist/switchboard
21 operator at a police headquarters did not occupy a position of
22 trust where she unlawfully gave notice of an impending search and
23 seizure. In Recco at 31, the court explains that: "The
24 Application Notes, as amended in 1993, explain that positions of
25 trust are characterized by significant discretion and minimal
26 supervision;" and then goes on to quote the new Application Note,
27 which we quote here in part:

"Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitate in the commission or concealment of the offense (e.g. by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual assault of a patient by a physician under the guise of an examination. ***" (Emphasis added.)

In Recco at 32, the court found that, although Recco's "position afforded her access to information," it did not repose "in her" a "discernable discretion." In fact, the prosecutor admitted that her position "involved no significant discretionary authority. Id. Likewise for CONTE.

C. General Principles

The prosecution bears the burden of establishing, by a preponderance of evidence, operative facts which rendered the application of a sentence enhancement appropriate in any given case. See, e.g., U.S. v. Howard, 894 F.2d 1085, 1090 (9th Cir. 1980).

With respect to the concern of "position of trust," the Commission has provided little guidance in identifying a qualifying relationship, other than to note the requirement of "professional or managerial discretion." Circuit opinions on this issue, however, elucidate certain principles which are pertinent in the present context. For example, it has been noted that S3B1.3 "...

1 refers exclusively to employment or professional relationships ..." 2
U.S. v. Pardo, 25 F.3d 1187, 1190 (3rd Cir. 1994).

3 Exceptions to this qualifying feature do exist, but they pre- 4
date the 1993 Application Note amendment discussed, supra. Two 5
cases have found the existence of a trust relationship where a 6
mother utilized a daughter's services in narcotics offenses and a 7
baby sitter took advantage of his position to commit sexual abuse 8
on a minor. U.S. v. Ledesma, 979 F.2d 816, 822 (11th Cir. 1992) 9
(mother-daughter). U.S. v. Zamarripa, 905 F.2d 337 (10th Cir. 10
1990) (baby sitter/minor). Nonetheless, the unifying principle 11
behind these varying contexts is "the authority given to defendant 12
by the position which provides the wherewithal to commit the 13
wrongful act." Pardo, supra at 1192. That is, "the position of 14
trust is characterized by access or authority over valuable 15
things." U.S. v. Lamb, 6 F.3d 415, 421 (7th Cir. 1993).

16 The Sixth Circuit has noted that under S3B1.3:

17 The element of professional or managerial
discretion is said to be the key. And, by
18 focusing on the deference ordinarily accorded
19 the substantial discretionary judgment
possessed by the holder of such a position of
20 trust, the sweep of the commentary's
definition is significantly narrowed.... as
21 used in the guideline, "position of public or
private trust" is a term of art, appropriating
some of the aspects of the legal concept of a
22 trustee or fiduciary.

23 U.S. v. Ragland, 72 F.3d 500, 502-03 (6th Cir. 1996). (Emphasis
24 supplied.) In accord, U.S. v. Jolly, 102 F.3d 46, 48-49 (2nd Cir.
25 1996).

26 It is apparent from the foregoing that, at least in the
27 framework of economic offenses, the position of trust upon which an
28

1 enhancement may be applied must assume the character of "trustee"
2 or "fiduciary," bearing the element of authority or discretion
3 which is capitalized upon by the defendant. The total absence of
4 these elements in CONTE'S case bars an adjustment under §3B1.3.

5 **D. The Factual Basis**

6 The factual basis underlying CONTE'S guilty plea appears at
7 pages 3-9 of the plea agreement (P.A.), and the following
8 stipulations (emphasis supplied) are particularly relevant to the
9 §3B1.3 issue:

10 1. "Defendant had been a long time acquaintance and
11 close personal friend of Kenneth Murdock [the victim]." (PA, at
12 p.3)

13 2. "In 1992 Murdock asked defendant, who had
14 experienced some personal financial and legal difficulties, to act
15 as an advisor to assist Murdock in investing some money..." (PA,
16 p.3)

17 3. "Third parties [Bogart and Lucci] devised a scheme
18 whereby, through false representations, they would get Murdock to
19 invest his money with them." (PA, p.4)

20 4. "Unknown to Murdock, for whom defendant was an
21 investment advisor [not a licensed "investment advisor"], defendant
22 demanded a finders fee of ten percent from Bogart and Lucci..."
23 (PA, p.4)

24 5. "Based on the presentation and persuasion by Conte,
25 Murdock made a trial investment ..." (PA, p.5)

26 6. "Within a few weeks thereafter ... Murdock agreed to
27 make a second investment ..." (PA, p.7)

7. "After Murdock made the 'second investment,' defendant found out that the whole investment scheme was a fraud. Instead of telling Murdock, he demanded that Bogart make him a fifty percent partner in the proceeds of all future investments by Murdock." (PA, p.8)

8. "Defendant, although fully involved in the scheme, continued to act as Murdock's advisor, and Murdock continued to rely upon the investment advice being given by his good friend."
(PA, p.8)

It is apparent from the core stipulations that the concept of "position of trust" in this case derives from CONTE'S characterization as a personal friend and "investment advisor," whatever that loosely means, given that CONTE was not a licensed investment advisor and did not hold himself out to be such. As the cases discussed, infra, will demonstrate, this is not a "distinction without a difference." As will also be obvious by the case law: neither characterization supports the enhancement under the specific facts of CONTE'S case. Moreover, it can hardly be said the MURDOCK was a vulnerable victim.

E. Case Discussion

Pardo, supra, involved a defendant whose personal friendship with a bank manager played a role in his successful carrying out of fraudulent transactions with the bank. The existence of that friendship was not permitted to support a sentence enhancement under §3B1.3 because, "At most, [Pardo's] position as a friend allowed him the opportunity to commit an easily detectible wrong ... Even more clearly lacking [in Pardo's case] is the requisite

1 degree of authority over the object of his wrong [Pardo] had
 2 no authority over anyone or anything necessary to the commission
 3 of his crimes." Id. at 1192. (Emphasis added.) Likewise for
 4 CONTE.

5 Similarly, in U.S. v. Mullens, 65 F.3d 1560 (11th Cir. 1995),
 6 the defendant took advantage of personal friendships at a country
 7 club to solicit investors in a "Ponzi" scheme he had devised. The
 8 court rejected a proposed enhancement under S3B1.3, primarily
 9 because the defendant "was not in a position of trust simply by
 10 virtue of developing ordinary social relationships." (Emphasis
 11 supplied.) Id. at 1566. The court further noted that
 12 "Fraudulently inducing trust in an investor is not the same as
 13 abusing a bona fide relation of trust with the investor." Id. at
 14 1567. It appears from the foregoing that a relationship of
 15 friendship between parties is not sufficient as a factual
 16 springboard for the enhancement proposed by the Government. CONTE
 17 further submits that the gratuitous description of defendant as an
 18 "investment advisor" affords no basis for the enhancement at issue.
 19 It has been noted, in the context of S3B1.3 that "an investment
 20 advisor/broker is typically an individual who is entrusted with
 21 discretionary authority to manage the assets of his or her clients
 22 through the application of specialized knowledge." (Emphasis
 23 added.) U.S. v. Queen, 4 F.3d 925, 929 (10th Cir. 1993). Such a
 24 person clearly occupies a "position of trust" under the Guidelines.
 25 See, U.S. v. Tardiff, 969 F.2d 1283, 1389 (1st Cir. 1992). But, of
 26 course, this means a licensed "investment advisor," not a
 27 friend/investment advisor. Moreover, the enhancement will apply to
 28

1 a defendant who falsely represents himself to be a professional
2 financial consultant and who then proceeds to exercise broad
3 discretionary powers in respect to other people's assets. Queen,
4 supra, at 929. CONTE did not claim to be a professional financial
5 consultant.

6 F. CONTE: Not a "Fiduciary" or a "Trustee"

7 The factual basis of CONTE'S plea discloses the absence of
8 factors rendering CONTE in a cognizable position of private trust
9 vis a vis the victim, MURDOCK. Nowhere is it alleged that CONTE
10 held himself out to be a professional financial consultant. In
11 that sense, he was no more a "fiduciary" or "trustee" than a
12 personal friend one consults as to what kind of car to buy. More
13 importantly, CONTE at no time exercised any professional or
14 managerial discretion with respect to the invested funds at issue.
15 CONTE initially concealed his finder's fee interest in monies
16 fraudulently obtained by third parties, and later profited from the
17 third party fraud when he discovered its existence. CONTE never
18 managed the assets of the victim, and never claimed to possess
19 special knowledge, skill or status as an investment counselor. At
20 best for the Government, CONTE abused a position of personal
21 friendship, but that fact alone has never been held to constitute
22 a basis for enhancement under the trustee or fiduciary concept
23 contemplated by the Sentencing Commission.

24 Moreover, whether one applies an objectively reasonable or
25 subjectively reasonable test, it should be noted that MURDOCK'S
26 claimed reliance on CONTE was clearly unreasonable, given that
27 MURDOCK knew, inter alia, that:

- a. CONTE had mental problems (diminished capacity/bi-polar condition);
- b. CONTE had been convicted of a felony in federal court in Utah for failure to pay taxes and spent time in jail;
- c. CONTE was on probation for the federal offense;
- d. CONTE repeatedly failed in his business ventures.

In addition, recall that MURDOCK had a professional advisor, BOREN, MURDOCK'S business manager. Thus, it can hardly be said that MURDOCK, a sophisticated businessman who owned a multi-million dollar business, could have reasonably relied upon CONTE as his friend and/or financial advisor for sophisticated financial advice involving hundreds of thousands of dollars. Moreover, how can it be said that MURDOCK, a self-made millionaire in sound mental health, was a vulnerable victim? What we have here is a situation of, at most, and at best for the Government, friendship, which is not sufficient to cause a 2 level increase under S3B1.3. Like Pardo, the friendship does not support a sentence enhancement because "at most, CONTE'S position as a friend allowed him an opportunity to commit an easily detectable wrong...." CONTE, like Mullens, "was not in a position of trust simply by virtue of developing ordinary social relationships."

While on the one hand MURDOCK complains that CONTE misled him concerning CONTE'S investigation of BOGART and LUCCI, MURDOCK proceeded unreasonably, with "willful blindness," ignoring the adages, "If it sounds too good to be true, it is, and "Pigs get fat; hogs get slaughtered." Knowing CONTE was a convicted felon,

had lost \$900,000 in investments from friends, and was bi-polar, MURDOCK obviously should have conducted independent due diligence with respect to the activities of BOGART, LUCCI and even CONTE.

Yes, CONTE and MURDOCK were close friends. But, CONTE was not licensed as an attorney, accountant, financial advisor, financial planner, stockbroker, or the like. Nor did CONTE hold out to MURDOCK that CONTE held expertise in the area of business investments. Quite to the contrary, by CONTE'S track record of repeated failing businesses, CONTE was a perfect example as to how not to proceed in business matters. MURDOCK was on notice of CONTE'S personal (mental, emotional and financial) and professional (business/financial) shortcomings. MURDOCK played out his role of loyal friend to CONTE. And, MURDOCK had a business manager, BOREN, who in fact was against the subject investments. That MURDOCK foolishly listened to CONTE, not to BOREN, attests to MURDOCK'S lack of business judgment, and to his greed, not to any position of trust held or claimed by CONTE.³

The CONTE and MURDOCK friendship began circa 1992. MURDOCK was undergoing marital problems and in fact was separated from his wife and lived in a condo and kept begging CONTE to live in the condo with him. CONTE and MURDOCK would spend considerable time together, including not only working out, but going to basketball games and restaurants. MURDOCK was very much taken back when CONTE, who was already married, did not have the time to spend with MURDOCK and would not leave CONTE'S wife and children to live with

³ MURDOCK expected a quick 15% return on his money. "If it sounds too good to be true, it is."

MURDOCK. In fact, CONTE and his family moved to Arizona for purpose of getting away from MURDOCK, given MURDOCK'S overbearing, controlling, and manipulative personality. MURDOCK'S claim that CONTE "was the key to the entire fraud," PSR page 4, line 36, is belied by the probation officer's recognition that but for BOGART and his scheme devised ab initio by BOGART, there would have been no involvement by CONTE in this MURDOCK fraud.

MURDOCK did not hire CONTE as a "financial advisor at a salary of \$4,000 per month," PSR, page 5, line 6. Rather, MURDOCK, knowing of CONTE'S sordid background and financial difficulties, agreed to loan CONTE about \$50,000. In fact, an amortization statement was prepared by MURDOCK'S CPA firm at MURDOCK'S request. See EXHIBIT 3. CONTE has checks showing interest payments from CONTE to MURDOCK. See EXHIBIT 4.

Known to MURDOCK, other friends of MURDOCK and CONTE suffered financial losses after investing with CONTE: \$900,000! These friends and their loss were all well-known to MURDOCK before MURDOCK agreed to the BOGART investment.

G. Parallel Cases

In Jolly, supra, at 48, the court found that \$3B1.3 enhancement is inappropriate in a fraud case where a lender was defrauded by misrepresentations of the defendant. The court pointed out that "The trust in short is a specific offense characteristic of fraud, and a 3B1.3 enhancement is inappropriate." The court then went on to note that: "Such reliance is the hope of every defendant who engages in fraud." Id. In other words, fraud by definition requires reliance and reliance by definition requires

1 trust. Thus, the position of trust must be some special position
 2 of trust, again demonstrating the link between "position of trust"
 3 and "special skill." Every con man is in at least some general
 4 position of trust, otherwise the victim would not rely upon the con
 5 and no fraud would take place. CONTE can find not a single case
 6 where trust based on friendship was sufficient to elevate the trust
 7 to a level where a \$3B1.3 enhancement is warranted. See 121 ALR
 8 Federal 323 (West 1994), "Increase in Base Offense Level Under
 9 Sentencing Guidelines \$3B1.3 (18 U.S.C.A. Appx \$3B1.3) for Abuse of
 10 Position of Public or Private Trust Significantly Facilitating
 11 Commission or Concealment of Offense."

12 Again, the Jolly court relied in part on Mullens, supra, where
 13 the court "rejected the government's argument that the victim's
 14 confidence in Mullens as a result of membership in the same country
 15 club created a relationship of trust." Likewise, the court
 16 rejected that Mullens' role was like that of an investment advisor
 17 because Mullens did not hold himself out as an investment broker or
 18 advertise his company as an investment brokerage firm.

19 Again, in Pardo, supra, friendship of a bank manager was not
 20 enough where the bank manager "who had been a personal friend of
 21 Pardo's wife for ten years and was a bridesmaid at the Pardos'
 22 wedding" was negligent in failing to conduct a background check on
 23 Pardo. Id. at 1189. If she had, she would have discovered that
 24 Pardo had already committed previous frauds at other banks. In
 25 fact, given the extent of the personal relationship, the Pardo case
 26 comes the closest to CONTE'S situation. The Pardo court, at 1192,
 27 set out three principles:

(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in the defendant vis a vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position. These factors should be considered in light of the guiding rational of the section--to punish "insiders" who abuse their position rather than those who take advantage of an available opportunity.

CONTE does not fit within any of the three categories. See
also, the Ninth Circuit's pronouncement, U.S. v. Hill, 915 F.2d
502, 509 (9th Cir. 1990), where the Ninth Circuit stated, "[T]he
primary trait that distinguishes a person in a position of trust
from one who is not is the extent to which the position provides
the freedom to commit a difficult-to-detect wrong." Compare Queen,
supra (defendant "entrusted with the discretionary authority to
manage his victim's assets as he saw fit;" defendant's "asserted
status as an investment advisor/broker was part of the fraudulent
misrepresentations he made to his victims.") Id. at 928.

H. Ninth Circuit Cases

18 Hill, supra, is instructive, even though it pre-dates the 1993
19 Application Note Amendment, supra, by which the Commission placed
20 emphasis on managerial discretion. In Hill at 506, the court
21 looked at two indicia in determining that Hill, a truck driver for
22 a moving company, had a position of trust. This is because Hill
23 stole family goods from a family who was storing the goods in Texas
24 while moving to Europe. The court found that the family had an
25 objective means of determining Hill's honesty, but not an expedient
26 one, and that it was difficult, if not impossible, to observe Hill
27 during his cross-country trek; thus, he had opportunity. Here it

1 was not at all difficult for MURDOCK to, by due diligence, check
 2 out CONTE, et al. See, U.S. v. Isaacson, 155 F.3d 1083 (9th Cir.
 3 1998) (bank vault teller; abuse of position of trust enhancement
 4 warranted); U.S. v. Oplinger, 150 F.3d 1061 (9th Cir. 1998) (bank
 5 supply coordinator; two indicia identified in Hill met; abuse of
 6 position of trust affirmed); U.S. v. Thornton, 36 F.2d 1104 (9th
 7 Cir. 1994) (warehouse foreman; position of trust demonstrated);
 8 U.S. v. Cuff, 999 F.2d 1396 (9th Cir. 1993) (postal employee; not
 9 in position of trust); U.S. v. Hoang, 106 F.3d 410 (9th Cir. 1997)
 10 (bookkeeper; abuse of trust demonstrated); U.S. v. McCoy, 96 F.3d
 11 1452 (9th Cir. 1996) (president of corp; no position of trust);
 12 U.S. v. Chatter, 94 F.3d 653 (9th Cir. 1996) (school business
 13 manager; position of trust demonstrated); U.S. v. Sabbaghi, 91 F.3d
 14 157 (9th Cir. 1996) (defendant represented that he was a licensed
 15 stockbroker/expert; position of trust demonstrated); U.S. v.
 16 Dearborn, 995 F.2d 233 (9th Cir. 1993) (personal banker who handles
 17 functions not done by ordinary tellers abused position of trust);
 18 U.S. v. Ajiboye, 961 F.2d 892 (9th Cir. 1992) (mail carrier; abuse
 19 of position of trust demonstrated); U.S. v. Ray, 959 F.2d 243 (9th
 20 Cir. 1992) (customer service rep privy to confidential financial
 21 information; abuse of trust demonstrated); U.S. v. Stover, 951 F.2d
 22 364 (elementary school teacher; position of trust demonstrated);
 23 U.S. v. Barnes, 125 F.3d 1287 (9th Cir. 1997) (pharmacist; 2-level
 24 enhancement for abuse of position of trust or use of special skill
 25 affirmed); U.S. v. Duran, 15 F.3d 131 (9th Cir. 1994) (sheriff's
 26 deputy; abuse of position of trust enhancement affirmed); U.S. v.
 27 Christiansen, 958 F.2d 285 (9th Cir. 1991) (credit union branch

1 representative; position of trust demonstrated); and U.S. v. Cozzo,
2 156 F.3d 1239 (9th Cir. 1998) (office manager for medical practice;
3 abuse of position of trust demonstrated).

4 **V. REQUEST FOR DOWNWARD DEPARTURE**

5 CONTE has filed a separate motion requesting downward
6 departure.

7 **VI. SUMMARY AND CONCLUSION/CONTE'S SENTENCING REQUESTS**

8 CONTE requests the following:

9 1. Criminal History Category II;

10 2. No increase of 2 points for position of trust under
11 S3B1.3;

12 3. Downward departure of at least 10 levels for a
13 Guideline range of 4-10 months (Zone B) and halfway house/work
14 release;

15 4. In event of a "sentence of imprisonment," self
16 surrender no earlier than 30 days after sentencing.

17 **EXHIBITS:**

18 1 Guideline Calculation Chart
19 2 Criminal History Calculation Chart
20 3 Amortization
21 4 Checks
22 5 Sentencing Summary Chart

23 //

24 //

25

26

27

28

DATED this 10 day of December, 1998.

D
Donald W. MacPherson
3404 W. Cheryl Dr., #A250
Phoenix, AZ 85051
Ph. 602-866-9566
Fax 602-866-3799
Bar #005627
Counsel for Defendant
(Pro Hac Vice Application Pending)

John G. Mitchell
John Mitchell
2445 5th Avenue, #200
San Diego, CA 92101
Ph. 619-237-9155
Fax 619-237-0128
Local Counsel

Copy of the foregoing mailed
this 10 day of December, 1998 date, to:

James Brannigan
Asst. U.S. Attorney
Federal Building
880 Front Street, Rm. 6293
San Diego, CA 92101-8893
Ph. 619-557-65769

Kenneth Ramsdell
Probation Officer
401 W. A, Suite 500
San Diego, CA 92101
619-557-5261

a.psmem.com

**CONTE GUIDELINE CALCULATIONS
(Before Any Downward Departure)**

	<u>Probation Officer</u>	<u>Government</u>	<u>Defendant</u>
Base Offense	6	6	6
Fraud Loss	+13	+13	+13
More than minimal planning	+ 2	+ 2	+ 2
Position of trust	+ 2	+ 2	0
	---	---	---
Adjusted Offense Level	23	23	21
Acceptance of Responsibility	- 3	- 3	- 3
	---	---	---
Total Offense Level	20	20	18
Criminal History Score ¹	5	6	3
Criminal History Category	III	III	II
GL Range (months)	41-51	41-51	30-37

Exhibit 1

a:conte\glchtrs.con

¹ See Exhibit 2 for calculation.

CONTE CRIMINAL HISTORY CALCULATION

	<u>\$4A1.1</u>	<u>Probation Officer</u>	<u>Government</u>	<u>Defendant</u>
(c) Utah Federal Conviction (less than 60 days imprisonment)		2	2	1
(c) Utah State Conviction (vacated)		1	1	0
(d) Offense Committed While on Probation		2	2	2
(e) Offense Committed Within 2 Years of Prior Offense	0 ---	1 ---	0 ---	
Total	5	6	3	

CONTE'S S4A1.1 analysis: The Utah federal conviction resulted in a "sentence of imprisonment" of about 45 days, less than 60 days, thus (c), not (b) applies. The Utah state conviction was vacated, and thus, does not apply. There is no application of (e) because there is no (a) or (b).

Exhibit 2

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P001/006

FACSIMILE COVER SHEET



Nature's Way Products, Inc.
10 Mountain Springs Parkway
P.O. Box 4000
Springville, UT 84663

FAX Group
and Group
(801) 489-171
voice (801) 489-151

Sent to: Russ Conte

Fax No: 602-922-8453

From Lorraine Clark

Date October 25, 1994

Total number of pages 1 (including this cover sheet). If all pages are not received, please contact us immediately.

Message/Delivery Instructions:

Russ:

Sherri and Steve, the two I work with at Deloitte and Touche, are at a seminar all week. I left a message for them to call me the first of the week. I will follow-up with them and get back to you when I hear from them.

Attached is the amortization schedule.

CON 04545

EX. 3 1/6

The information contained in this facsimile message is privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or if the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of the communication is prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service.

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P002/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

RESTATEMENT OF PROBLEM ELEMENTS

Problem Type:

Present Value of a Series of Payments, With
Payments at the Beginning of the Period

Known Variables:

Periods per Year	12
Present Value.....	\$22,051.00
Annual Nominal Interest Rate.	+5.0000%
Total Number of Periods.....	60.00

Unknown Variable:

Payment.....	\$414.40
--------------	----------

CON 04546

Note: The solution was calculated based on the annual nominal interest rate a number of periods per year. Interest is computed and compounded based on periods of equal length which are determined by the number of periods per year. The effective annual interest rate in this application is 5.116

Ex. 3

26

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P003/006

Deloitte
Haskins+Sells

INTEREST

Release

Job: KEN Problem: amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

ACCRAUL BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
10	414.40	90.15	324.25	21,726.75
11	414.40	88.80	325.60	21,401.15
12	414.40	87.44	326.96	21,074.19
1993	1,243.20	266.39	976.81	21,074.19
1	414.40	86.08	320.32	20,745.87
2	414.40	84.71	329.69	20,416.18
3	414.40	83.34	331.06	20,085.12
4	414.40	81.96	332.44	19,752.68
5	414.40	80.58	333.82	19,418.86
6	414.40	79.19	335.21	19,083.65
7	414.40	77.79	336.61	18,747.04
8	414.40	76.39	338.01	18,409.03
9	414.40	74.98	339.42	18,069.61
10	414.40	73.56	340.84	17,728.77
11	414.40	72.14	342.26	17,386.51
12	414.40	70.72	343.68	17,042.83
1994	4,972.80	941.44	4,031.36	17,042.83

CON 04S47

3/6

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P004/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization
Run on 10/14/94 at 10:53Prepared by _____ Date _____
Reviewed by _____ Date _____

ACCUMULATION BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
1	414.40	69.29	345.11	16,697.72
2	414.40	67.85	346.55	16,351.17
3	414.40	66.40	348.00	16,003.17
4	414.40	64.95	349.45	15,653.72
5	414.40	63.50	350.90	15,302.82
6	414.40	62.04	352.36	14,950.46
7	414.40	60.57	353.83	14,596.63
8	414.40	59.09	355.31	14,241.32
9	414.40	57.61	356.79	13,884.53
10	414.40	56.13	358.27	13,526.26
11	414.40	54.63	359.77	13,166.49
12	414.40	53.13	361.27	12,805.22
1995	4,972.80	735.19	4,237.61	12,805.22
1	414.40	51.63	362.77	12,442.45
2	414.40	50.12	364.28	12,078.17
3	414.40	49.60	365.80	11,712.37
4	414.40	47.07	367.33	11,345.04
5	414.40	45.54	368.86	10,976.18
6	414.40	44.01	370.39	10,605.79
7	414.40	42.46	371.94	10,233.85
8	414.40	40.91	373.49	9,860.36
9	414.40	39.36	375.04	9,485.32
10	414.40	37.80	376.60	9,108.72
11	414.40	36.23	378.17	8,730.55
12	414.40	34.65	379.75	8,350.80
1996	4,972.80	518.38	4,454.42	8,350.80

CON 04548

4/6

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P005/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

ACCUMULATED BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
1	414.40	33.07	381.33	7,969.47
2	414.40	31.48	382.92	7,586.55
3	414.40	29.88	384.52	7,202.03
4	414.40	28.28	386.12	6,815.91
5	414.40	26.67	387.73	6,428.18
6	414.40	25.06	389.34	6,038.84
7	414.40	23.44	390.96	5,647.88
8	414.40	21.81	392.59	5,255.29
9	414.40	20.17	394.23	4,861.06
10	414.40	18.53	395.87	4,465.19
11	414.40	16.08	397.52	4,067.67
12	414.40	15.22	399.18	3,668.49
1997	4,972.80	290.49	4,682.31	3,668.49
1	414.40	13.56	400.84	3,267.65
2	414.40	11.89	402.51	2,865.14
3	414.40	10.21	404.19	2,460.95
4	414.40	8.53	405.87	2,055.08
5	414.40	6.84	407.56	1,647.52
6	414.40	5.14	409.26	1,238.26
7	414.40	3.43	410.97	827.29
8	414.40	1.72	412.68	414.61
9	414.61	0.00	414.61	0.00
1998	3,729.81	61.32	3,668.49	0.00

CON 04549

5/6

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P006/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

ACCRUAL BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
TOTAL	24,864.21	2,813.21	22,051.00	0.00

Note: The last payment of this problem includes a cumulative rounding difference caused by rounding interest amounts to whole cents in the amortization schedule. The amount of the rounding difference in the last payment is \$ 0.21 .

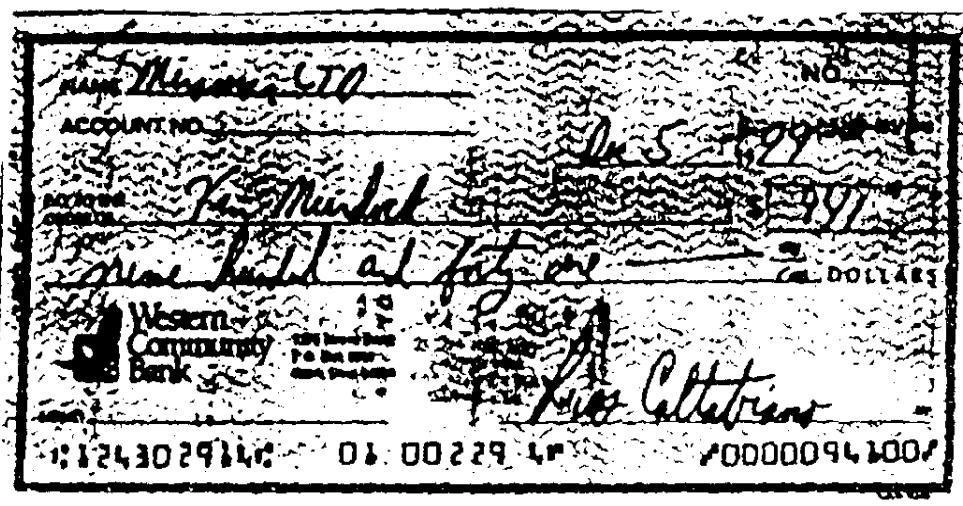
CON 04550

6/6

FAXED
12/11/98

Dec. 1, 94

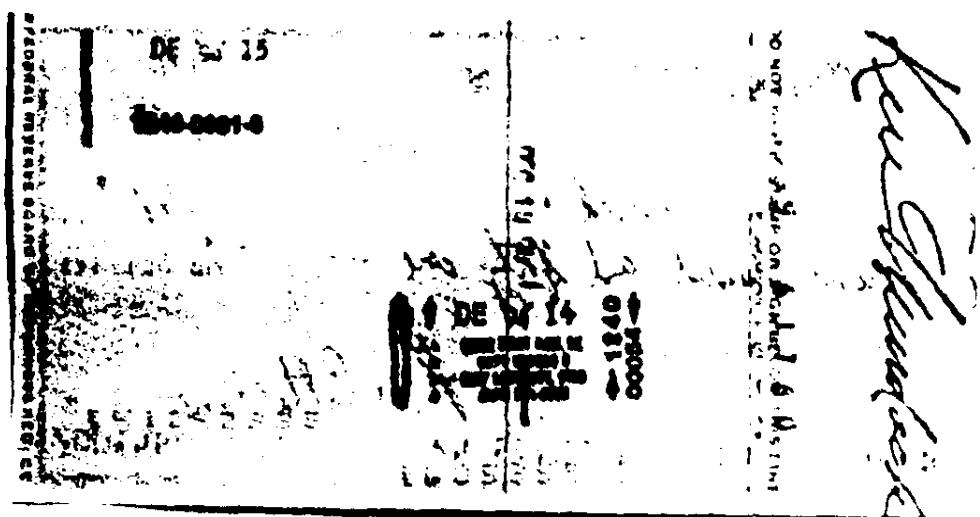
\$1243.



Dec. 5, 94

Ex 4

1/1



SI FENCING SUMMARY CHART

USPO
AUSA
DEF ✕

Defendant's Name:

Russell J. ConteDocket No. 98-0519 JM

Guideline Manual Used:

November

1,

1998

Agree with USPO Calc.:

Base Offense Level: (Drug Quantity, If Applicable:

)

6

Special Offense Characteristics:

Loss Sec. 2F1.1(b)(N)+13More than minimal planning Sec. 2F1.1(b)(2)(A)+2

Victim Related Adjustment:

Adjustment for Role in the Offense:

Adjustment for Obstruction of Justice:

Adjustment for Reckless Endangerment During Flight:

Adjusted Offense Level:

Combined (Multi-Counts)

Career Off.

Armed Career Crim.

Adjustment for Acceptance of Responsibility:

Total Offense Level:

Criminal History Score:

Criminal History Category:

Career Offender

Armed Career Criminal

Guideline Range:

(Range limited by:

minimum mand.

stat. maximum)

from

30

to

37mnth
s

Departures:

See Motion: POST OFFENSE REHAB IDIMINISHED CAPACITY, etc.-10= 8 TOL:8-14 mos.